AMERICAN BUSINESS TORTS AND THE „ECONOMIC LOSS RULE“[1]

Vincent R. Johnson*
Professor of Law and Director,
Institute on Chinese Law and
Business

American businesses often assert tort claims. They sue competitors, former employees, and other persons or entities under a variety of theories. Claims are often made for misrepresentation, defamation, tortious interference with contract, product disparagement, unfair competition, and negligence.

Anyone trying to understand American business tort litigation must begin by placing the subject in context. It is important to understand that tort law in the United States is exceedingly complex. This is an outgrowth of three factors.

First, in the U.S., tort law is mainly state law, not federal law. That means that there are at least 51 different tort systems (in the 50 states and the District of Columbia), each with its own somewhat different rules and procedures. The actual number of tort systems is even larger if one counts the six U.S. territories and the Native American Indian nations. Moreover, in some situations, federal law (including the U.S. Constitution and statutes passed by Congress) pre-empts state tort law.

Second, no state has a single comprehensive tort code. Instead, American tort law is a mixture of legislation and „common law“ judicial decisions. Thus, in each jurisdiction, the rules of tort law come not just from legislative enactments (a multitude of state statutes, local ordinances, and administrative regulations), but from principles that are drawn from the opinions that are issued by courts in deciding actual cases.

Third, tort law is an immensely important field of law in the United States. Numerous tort claims are asserted informally (often in letters demanding compensation) or formally filed and litigated. Ultimately, most cases are settled, but many are decided by trial or appellate tribunals. There is an endless stream of decisions flowing from thousands of courts. In addition, state legislatures, often at the urging of lobbyists and interest groups, are always considering, and sometimes enacting, „tort reform“ laws to change various aspects of the applicable rules.

The complexity and ever-changing nature of American tort law gives this field of law both vitality and flexibility. Courts can respond to any tort claims that come before them, and claims can be found to have merit even if there is no codified rule expressly dealing with the particular subject matter. The general principles of the common law are extended to new situations as the need arises. Thus, courts often define the tort obligations of persons and entities in what might be thought of as cutting-edge contexts, such as losses related to breaches of data security or the outsourcing of professional services to low-cost providers in other countries. There are sure to soon be cases deciding liability issues related to the new technology called 3-D printing.

The most important doctrine in American tort law is negligence. The law of negligence requires persons to exercise reasonable care to avoid causing foreseeable harm to others. Negligence principles can be applied to virtually any endeavor. Claims related to negligent hiring, negligent training, and negligent supervision are common in the business context.

The nature of the common law sometimes produces surprises. Scholars or judges looking back on a series of court decisions occasionally conclude that, even though those cases did not seem to be related, they are actually proof of a broader rule that is potentially applicable to a wide range of future disputes. This is precisely what happened in the late 1990s and early 2000s.

Proponents of what has become known as the American „economic loss rule“ argued that there is a common law rule which broadly holds that purely economic losses (i.e., monetary losses where there is no personal injury or property damage) cannot be recovered in a tort action for negligence or strict liability (a theory of recovery that

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*** Professor of Law, St. Mary’s University, San Antonio, Texas, USA. Professor Johnson’s article (The Boundary-Line Function of the Economic Loss Rule, 66 Washington & Lee Law Review 523 (2009) has been cited or quoted by 20 American courts.**

sometimes substitutes for negligence). Purely economic losses, they said, are compensable only under contract law principles. Some scholars and courts agreed with these contentions, at least in some contexts. Many did not. The issue of whether there is an „economic loss rule" was raised in hundreds of cases across the country and the resulting decisions were often confused and inconsistent.

In thinking about whether, under American law, there is a broadly applicable „economic loss rule," it is important to remember that the potential stakes are huge. Many losses today are purely economic.

Consider, for example, the 2010 BP oil spill in the Gulf of Mexico. That oil spill, which was probably caused by negligence (or by activities that would result in strict liability), resulted in billions of dollars of damages. Most of those damages were purely economic losses. Some persons suffered personal injuries (e.g., injuries to rescue crew workers) and some persons suffered property damages (e.g., the operators of boats that were damaged when the boats came into contact with the oil, or the property owners along the Gulf coast whose beaches were polluted by oil). However, most of the oil spill claims were for purely economic losses related to the profitability of businesses.

For example, some persons were afraid that fish and seafood from the Gulf had been contaminated, and therefore they did not buy those products. As a result, purely economic losses were suffered by the companies that sell fish and seafood, by the businesses that would have transported or stored those products, and by the workers who were laid off or worked fewer hours because of the diminished demand for fish and seafood.

Similarly, some persons feared that the beaches along the Gulf coast and the water were contaminated, too dangerous for swimming. They therefore went elsewhere for their vacations. As a result, the hotels, restaurants, and stores along the Gulf coast suffered purely economic losses because there were fewer customers.

In the end, there was no definitive court ruling on tort liability resulting from the BP oil spill. Under political pressure from the Obama Administration and extremely bad publicity, BP voluntarily agreed to pay more than $20 billion in losses.

However, if the tort claims of the persons who suffered purely economic losses as a result of the BP oil spill had been decided in court, those plaintiffs might have been barred from recovery by the „economic loss rule." Moreover, if those claimants were relegated to contract law remedies, they might have recovered nothing under that theory either. The hotels and restaurants along the shore, for example, had no contracts with BP, which was drilling far off shore. They could not have sued BP for breach of contract.

No one in the United States talked about an „economic loss rule" twenty years ago. No one thought that such a rule existed. So why did some courts and scholars begin to think that such a rule was part of American common law tort principles? It seems that they were influenced by decisions that courts had made in three kinds of cases.

First, in cases involving defective products, courts had refused to permit recovery under tort principles if the defective product harmed only itself. That is, only if the product defect caused injury to a person or harm to other property could the victim bring an action for negligence (or strict liability).

For example, if, as the result of defect, a new iPad catches fire and burns the plaintiff or burns down the plaintiff's house, the plaintiff can sue in tort to recover compensation for those loses. In contrast, if a defective iPad simply short circuits and does not work anymore, the plaintiff is only allowed to bring a contract action for breach of warranty, not a tort action for negligence.

The idea behind these types of rulings is that when a plaintiff buys product, the plaintiff has a chance to decide how much to spend and what features or protections to bargain for. Denying a disappointed product purchaser a tort action for negligence in cases involving purely economic losses creates an incentive for consumers to exercise diligence to protect their own interest. These types of rulings in cases involving defective products were one bit of evidence that negligence that causes purely economic losses is not actionable under tort principles.

Second, when a driver negligently causes a traffic accident, persons who suffer physical injuries or property damages are allowed to bring tort actions for negligence. However, persons whose cars are tied up in a traffic jam caused by the accident, and who do not get to work on time and therefore earn less money, are not allowed to sue the negligent driver to recover their purely economic losses. This was more evidence that negligence that causes only economic losses is not actionable under tort law.

Third, American cases have generally agreed that interference with the performance of a contract is actionable as a tort only if the interference is intentional. Negligent interference is not actionable. Thus, if a Business A intentionally induces Person B, who is a key employee of Business C, to breach Person B's contract with Business C, Business A is liable to Business C for harm caused by Person B's breach. (Of course, Company C can also sue Person B for breach of contract, but B may not have money to pay a judgment.)

In contrast, if Person A negligently injures Person B, a key employee of Business C, by causing an auto accident, Business C cannot sue Person A for the economic losses that it suffers as a result of the negligent injury of Person B. Only intentional interference with contractual rights is a tort. The decisions in these kinds of cases was more evidence that American tort law does not provide a remedy for negligence that causes purely economic losses.

Relying on these types of scattered precedent, some

scholars and jurists argued that there is a broad, unified rule in American tort law which means that negligence which causes purely economic losses is never actionable under tort law. They insisted that the only recourse of victims of purely economic loss is under contract principles.

However, it soon became clear that if there is a single, broad „economic loss rule," it is a rule with many exceptions. For example, lawyers who commit malpractice can be sued for negligently causing purely economic losses (e.g., the failure of a business transaction or a loss of a claim or defense in litigation). Similarly, businesses are routinely held liable for purely economic losses caused by the tort of negligent misrepresentation.

Courts not only identified a long list of exceptions to the supposedly broad „economic loss rule," they also realized that an expansive formulation of the rule undercut the important public policy considerations that shape American tort law. Those policies include the ideas that liability should be based on fault, that tort rules should impose penalties to deter the occurrence of unnecessary losses, and that enterprises that benefit from dangerous activities should be forced to internalize the costs of harm arising from those activities.

Of course, American jurists have always recognized that there are limits to the negligence theory of tort liability. It is widely agreed, for example, that a breach of a purely contractual duty cannot be the basis of a tort action for negligence. For example, suppose that a newspaper agrees to publish an advertisement, but negligently fails to do so. As a result, the business that paid to have the ad published suffers economic losses. The business can sue the newspaper for breach of contract, but cannot bring a tort cause of action for negligence.

Recently, a consensus has begun to emerge in the United States. The consensus holds that there is no unified broadly applicable „economic loss rule," but only a narrow „economic loss rule" that relegates potential plaintiffs to contract remedies only when that makes sense. Thus, if there was a contract between the plaintiff and the defendant, and the claim relates to the performance of the contract, the plaintiff can only sue for breach of contract, not for the tort of negligence. Similarly, if there was no contract between the plaintiff and defendant , the narrow formulation of the „economic loss rule" does not bar a suit for negligence.

Consider the case of *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407 (Tex. 2011). That case was decided by the Texas Supreme Court, the highest court of America's second most populous state. These were the facts: A City hired Company A to install and operate a clean water system for the City. Years later, the City hired Company B to install and operate a waste water system for the City. Because Company B installed the waste water lines above the clean water lines, there was a risk that the clean water supply would become contaminated. The clean water lines also no longer complied with the requirements of state law and money would have to be spent to move the clean water lines or protect them from contamination.

The *Sharyland* dispute concerned purely economic losses, because there was no personal injury or property damage. As of the time of the lawsuit, the waste water lines had not corroded the clean water lines, and the clean water supply had not been contaminated. However, money would have to be spent by Company A to move or protect the lines. The question was whether Company A could make Company B pay for the costs of bringing the clean water into compliance with state law. Company A would not have to have need to incur those costs if Company B had not been negligent.

The Texas Supreme Court held that Company A could sue Company B for negligently caused pure economic losses. There was no contract between Company A and Company B, and the dispute did not involve the performance of contractual duties owed by Company B to Company A. It made no sense to say that Company A's only remedy against Company B was under for breach of contract, because there was never a contract between the two entities. By endorsing a narrow version of the „economic loss rule,“ the Texas Supreme Court held that Company A was not barred from suing Company B for purely economic losses caused by negligence.

Note that the result would probably have been different if Company A never existed and the City had sued Company B for purely economic losses relating to clean water lines that the City had installed and operated for itself. In the case, the claim related to the negligent installation of the waste water lines would have been a claim between the parties to the waste water contract (the City and Company B). Arguably, the City and Company B bargained, or should have bargained, about whether Company B would be liable for purely economic losses caused by negligent performance of its contractual duties. The narrow version of the „economic loss rule“ bars a party to a contract from suing in tort for losses related to performance of a contract.

In sum, while a consensus in favor of a narrow version of the „economic loss rule“ has started to take hold in the United States, there is still much confusion about whether tort law provides remedies for negligently caused purely economic losses. With more than fifty different American jurisdictions, it will take years for the law to evolve to the point where it is reasonably uniform on the subject of whether purely economic losses can be recovered in a negligence action. In the meantime, much is at stake. In the modern world, negligence often causes only economic losses, unaccompanied by personal injuries or property damages. These issues are of great importance to American businesses.

ამერიკული ბიზნეს - დავები და „ეკონომიკური ზარალის კანონი“

ვინსენტ რ. ჯონსონი
სანტ-მარის უნივერსიტეტის სამართლის
პროფესორი, სან ანტონიო, ტეხასი, აშშ

რეზიუმე

ამერიკულ ბიზნესში ხშირია ეკონომიკური დავები. ბიზნესმენები სხვადასხვა მოტივით უჩივიან კონკურენტებს, ყოფილ თანამშრომლებს, ფირმებს თუ სხვა პირებს. ხშირად საჩივრები ეხება არასათანადო წარმომადგენლობას, ცილისწამებას, კონტრაქტის პირობების დარღვევას, პროდუქციის ხარისხის შეუსაბამობას, არასამართლიან კონკურენციას, გულგრილობას და სხვ.

არსებობს ერთგვარი გაუგებრობა და კითხვები იმის თაობაზე, სთავაზობს თუ არა ბიზნეს-დავების სამართალი გულგრილობით გამოწვეული მოსალოდნელი ეკონომიკური ზარალის ანაზღაურების შესაძლებლობას ამერიკულ ბიზნესს. საკითხი აქტუალურია, რამდენადაც აშშ-ში შტატების მიხედვით 50-ზე მეტი განსხვავებული იურისდიქციაა და წლებია საჭირო, რათა აშშ-ის საზოგადოება მივიდეს ერთიან მოსაზრებამდე, რომელიც უპასუხებს გამოწვევას — **გამართლებული იქნება თუ არა გულგრილობით განპირობებული მოსალოდნელი სუფთა ეკონომიკური ზარალის ანაზღაურება**.

გავრცელებული პოზიციის თანახმად, გულგრილობამ შეიძლება გამოიწვიოს მხოლოდ მოსალოდნელი ეკონომიკური ზარალი, რასაც ამავე დროს თან არ ახლავს ფიზიკური პირის დაზიანება, ან საკუთრების ზიანი. აღნიშნულის გამო, სხვადასხვა ქვეყნებშიც განსხვავებულია პრობლემის მიმართ დამოკიდებულებაც. შესაბამისად, საკითხი მნიშვნელოვანია არა მხოლოდ ამერიკული, არამედ მსოფლიო ბიზნესისთვის.

სტატიაში წარმოდგენილია ავტორის უაღრესად საყურადღებო მოსაზრებები.[1]

1 პროფესორ ჯონსონის სტატია („ეკონომიკური ზარალის კანონის საზღვრების ფუნქცია“, 66 Washington & Lee Law Review 523 (2009) გამოყენებულ იქნა 20 ამერიკული სასამართლოს მიერ სხვადასხვა განაჩენის გამოტანისას.